OUTER HOUSE, COURT OF SESSION

[2009] CSOH 116

OPINION OF LORD WOOLMAN

in the cause

ELIZABETH GORDON

Pursuer;

against

MARK MARTIN LYNCH

Defender:

Pursuer: Di Rollo, L. Milligan; Solicitors: Digby Brown SSC

Defender: Hanretty QC, Charteris; Solicitors: HBM Sayers

6 August 2009

Introduction

[1] On 16 May 2004 Sean Milligan ('Sean') sustained very serious injuries in a road traffic accident in Carluke. He was driving a Nissan Micra when it collided head-on with a stolen van being driven by the defender. At the time of the accident, the defender was under the influence of alcohol. He was driving the van on the wrong side of the road. Subsequently, he was convicted of various contraventions of the Road Traffic Acts, including being a disqualified driver. He was sentenced to a term of imprisonment.

[2] The pursuer is Sean's sister. In March 2006 she was appointed his financial and welfare guardian. In the present action she seeks compensation on behalf of Sean for the injuries that he sustained in the accident. Liability has been admitted. The pursuer received the sum of £350,000 by way of interim damages in May 2007. That sum has been used to put a care package into place for Sean.

Injuries and Treatment

Wishaw General Hospital

[3] As a result of the accident, Sean sustained traumatic brain injury. Initially, he had a score of 3 on the Glasgow Coma Scale, indicating a state of deep unconsciousness. He also suffered the following injuries:

a) A pneumothorax to the right side of the chest.

b) A closed fracture of the right neck of femur.

c) A closed fracture of the right middle/distal third of the femur.

d) An open comminuted fracture of the right patella.

e) A closed fracture of the right ankle.

f) An open comminuted fracture of the left patella with an underlying fracture of the distal femur.

It was not thought likely that Sean would survive his injuries. When she learned of the accident, the pursuer was in the United States of America following a cancer operation. She and her three sisters immediately travelled home to Scotland to be at Sean's bedside.

[4] Sean was taken by ambulance to the Accident and Emergency Department at Wishaw General Hospital. In the operating theatre, he underwent open reduction and internal fixation of his right femoral fracture and debridement of his lower limb wounds. He was then transferred to the Intensive Care Unit. In the course of the next few days, CT scans on his brain disclosed that he had sustained diffuse axonal injury. A tracheotomy was performed on 26 May. Sean's condition gradually improved. By 12 June 2004, he was transferred to a normal ward. He underwent further procedures on his right lower limb fractures on 29 June.

Central Scotland Brain Injury Rehabilitation Centre

[5] On 27 July 2004, Sean was transferred to the Central Scotland Brain Injury Rehabilitation Centre at Murdostoun Castle in Wishaw. He remained there for 28 weeks. On admission he was found to have severe problems with his short-term memory. His orientation was seriously impaired. Major cognitive, emotional and behavioural problems were identified. In particular, he was found to have problems with his general intellectual function, mental speed and executive functioning. He displayed moods of anxiety and anger.

Discharge to Pursuer's House

[6] On 10 February 2005, Sean was discharged to live with the pursuer at her home in Strathaven. At first he was in a wheelchair. She arranged for a housekeeper to assist with Sean's care. After carrying out a community care assessment, East Kilbride Social Work Department provided a carer between the hours of 10 am and 2 pm daily. It proved difficult to retain carers, however, due to Sean's challenging behaviour.

[7] According to the report of Mr Dunn, consultant neurosurgeon [6/1], Sean's problems at that stage were as follows:

a) His insight into the extent of his disabilities was limited. His memory problems had improved, but he had significant persisting defects in verbal and non-verbal memory.

b) He had periods of verbal and physical aggression and sexually inappropriate behaviour.

c) He had low levels of tolerance to noise.

d) He needed prompting to initiate self care, but was able to wash and dress independently. He needed help getting in and out of the shower.

e) His speech was fully intelligible, although occasionally mumbled and monotonous.

f) He had balance difficulties, although he could walk indoors using sticks and outdoors using a delta walking frame.

[8] These problems had a number of consequences. The deficits in Sean's memory and concentration meant that he could not anticipate events. That was compounded by his noise intolerance. He found it difficult to cope with any type of sudden noise, such as a dog barking or a telephone ringing. If an item was placed on the granite kitchen worktop, he described it as being like an explosion in his head. His response to such noises was to become angry and aggressive. Much of his aggression was directed toward the pursuer. On one occasion he tampered with her computer, because he didn't like the noise it made. As a result, she lost many years of work. There were also instances when Sean became loud and abusive in public.

[9] Sean often awoke overnight and went to the laundry room to smoke a cigarette. The pursuer used a baby alarm to monitor his movements. She was concerned that he might either forget to put out the cigarette, or not see where it was put out.

[10] In May 2005 Sean was assessed by Dr Pearsall, an associate specialist in psychiatry at Hairmyres Hospital. He decided to refer Sean to the Robert Ferguson Unit at the Royal Edinburgh Hospital. The Unit treats patients from all over Scotland who have psychiatric sequellae following brain injury. It has places for nineteen in-patients. The head of the Unit, Dr Langrell, visited Sean in January 2006 to carry out an assessment. She suspected that his aggressive behaviour might be linked to some underlying psychosis. Her view was that his current medication was not proving effective. Accordingly, she arranged to admit him to the Unit to see whether his complex symptomatology could be treated.

Robert Ferguson Unit

[11] After Sean was admitted as an in-patient at the Robert Ferguson Unit on 23 August 2006, his medication was stopped. Within three weeks his behaviour had significantly deteriorated. He exhibited signs of paranoia. He thought that the devil was in certain staff members and that they were poisoning his water. In order to prevent this, he stored water in cups in his cupboard. According to Dr Langrell, such patterns after brain injury are often firm, unshakable and have no rational basis. Patients alter their behaviour in line with such delusions and become more aggressive. Dr Langrell confirmed that Sean frequently made sexually disinhibited comments to female members of staff.

[12] Sean was prescribed new medication, which quickly improved his condition. In Dr Langrell's view, Sean suffers from two distinct conditions: psychotic disorder and organic personality disorder. Both are permanent and linked to the head injury. If his medication was withdrawn, Dr Langrell believes it probable that he would again become mentally unstable. She thinks it likely that his behaviour would deteriorate within two or three weeks.

[13] While he was still in the Robert Ferguson Unit, Sean was visited by Mrs Hodge of Case Management Services Limited ('CMS'). She had been instructed by the pursuer's solicitors to assess Sean and to consider appropriate care arrangements for him when he was discharged. She determined that he would require cover twenty four hours a day seven days a week. Sean remained in the Unit until 1 December 2007. After his discharge, the pursuer took him on holiday to the USA to stay with his sisters.

Discharge to Own Accommodation

[14] In February 2008 Sean moved into his own ground floor flat in Hamilton. Since then, he has been supported by a team of carers provided by the Momentum Care Agency. One carer is present with Sean at all times. Currently there are five members of the team, with one reserve member. There are two shifts per day, with a thirty minute changeover period. During that half hour the carers exchange information about Sean's condition. Overnight, a carer sleeps in the other bedroom within the flat to deal with any problem that arises.

[15] Mrs Hodge acts as the case manager. She oversees the care arrangements and liaises with the pursuer. They e-mail or telephone one another at least fortnightly and meet every couple of months. There are also meetings with the care team at two monthly intervals, some of which the pursuer attends.

[16] Mrs Hodge stated that she has developed a good relationship with Sean, which means that she can speak to him quite robustly. He sometimes stutters so badly that he cannot speak, which he finds frustrating. However, he now sends her e-mails detailing his activities and feelings. He tends to send them fortnightly, but she can also receive two or three further e-mails per week. They provide a useful source of feedback.

[17] If a problem with Sean does arise, the carer on duty will immediately contact Mrs Hodge. If it is serious she in turn will contact the pursuer, even if she is abroad. Momentum has a 24 hour on-call service and they will also be contacted.

[18] Sean has a number of deficits, which both individually and in combination, profoundly affect his everyday living. He stands five feet eight inches tall. He has put on weight and now weighs about fourteen or fifteen stones, compared with about nine and a half stones before the accident. He has problems removing his clothes, particularly his boots, and sometimes does not undress for bed. He eats very slowly, as he feels he could choke at any time. Certain meals have to be cut up for him, because he tends to use a fork in his right hand. He has not looked properly after his teeth and a course of dental work is necessary.

[19] His memory problems mean that he sometimes cannot remember who visited him yesterday, even with prompting. His concentration span is very short. He cannot organise his daily activities. Despite the fact that he makes 'to do' lists, he cannot be relied upon to take his medication. He requires to be prompted to wash and to wear clean clothes.

[20] Sean can often appear listless. Dr McKinlay, clinical psychologist, said that persons like Sean with damage to the frontal lobes of their brain sometimes appear to be depressed, but do not have the classic symptoms. They are not particularly dissatisfied or discontent. It is just that they are content to do nothing. That has a pervasive effect on many aspects of their life.

[21] Because of the weakness on Sean's left side, he can no longer play the guitar as well as he used to. He also becomes frustrated by not being able to remember the notes to play. Because of his significantly impaired hearing, he cannot take part in a group conversation. He tends to watch the same television programme repeatedly, because he knows what is being said. In order to correct his sight problems, he occasionally wears a patch over one eye.

[22] Sean is able to go out on foot with assistance and often goes to the local 24 hour shop with one of his carers. He has built-up shoes to compensate for the fact that one of his legs is shorter than the other. The walk would take an able bodied person a couple of minutes. Using a rollator and taking short shuffling steps, Sean takes about twenty five minutes. Sometimes he requires to return by taxi.

[23] His current flat is a modern two bedroom flat on the ground floor of the building. It is not entirely suitable for his needs, because (a) it has a step at the entrance, which Sean can only manage with care; (b) he finds it difficult to tolerate the noise of the buzzer which visitors press to gain entrance to the block; (c) it is not easy to manoeuvre a wheelchair within the flat; and (d) it does not have a spare bedroom in which the pursuer or another family member can sleep overnight.

Pre-Accident Condition

[24] Sean was not called as a witness. The evidence about his pre-accident condition came largely from the pursuer, supplemented by the information in the medical records. Sean is one of seven children. The family moved from Scotland to the United States about twenty-two years ago. His late parents ran a successful antiques business. Sean returned to Scotland in 2002, ostensibly to arrange for a branch of the business to be opened here. He lived at the pursuer's home in Strathaven.

[25] The pursuer described Sean as quiet, gentle and caring. She said he was loved by the whole family, including her children. He was a carpenter and although he had no qualifications, he made excellent furniture. He liked the outdoors, photography, driving his car and walking his dog. His particular passion was guitars. He was a gifted player and had many electric and acoustic guitars, the most valuable being worth about £6,000.

[26] Shortly before the accident, Sean put down a deposit on a flat. He agreed to delay moving into his new accommodation, however, as the pursuer required to travel to California for cancer surgery. She wished Sean to reside at her home while she was away. Her marriage had come to an end and her two children lived at home. Her son was in the final year of school and her daughter was at university.

[27] There are three linked aspects of Sean's pre-accident condition which have a bearing on the claim for damages. They are (a) his history of depression; (b) his long period of unemployment; and (c) a suggestion that he had problems with mobility.

History of Depression

[28] About a year before the accident, Sean attended his general practitioner "complaining of severe depression", including "occasional suicidal thoughts". He told his GP of a previous episode of severe depression when he was living in the United States of America in 1995. On that occasion, he said that had been prescribed Prozac. However, he only took it for about a month, as it led to nausea and headaches. His GP referred Sean to the Adult Mental Health Services Department at Hairmyers Hospital, but he failed to attend for his appointment.

[29] The 1995 episode was also mentioned by Dr Pearsall following his psychiatric assessment in May 2005. In his letter to Sean's general practitioner, Dr Pearsall stated that "a substantial amount" of the history was provided by the pursuer and continued:

"He has a long history of depression over the years and received treatment while living in America up until 2 years ago. There are no notes available for this period of ill-health, but it seems that his level of functioning and mobility were poor during his period in the USA. His sister noted that, at that time, he also had a number of obsessive habits and ways of doing things and these have continued following his injury. Over the years, he has found it very difficult to live on his own and has always required support and help from the family, either through providing employment or accommodation."

"He has had previous contact with the psychiatric services in America for treatment of depression and obsessive symptoms. It had been suggested during one of these assessments that he might have been schizophrenic, although his main diagnosis was thought to be depression."

Dr Pearsall concluded by saying that that although Sean had a marked depressive illness over the years, it did not seem obvious at the time of his assessment.

[30] The pursuer said that she was aware of the episode in 2003. However, she had not seen any evidence herself of Sean being depressed. Otherwise she would not have left him in charge of her children and house when she went abroad. She could not, however, explain the statement that he had received a lot of support from his family, nor did she have any knowledge about any supposed possibility of schizophrenia. She said that by January 2006, she had received further information about his mental problems from her sisters in the USA.

[31] Dr Langrell felt unable to comment on Sean's level of functioning or the degree of support he might have required, if the accident had not occurred. However, it was her clear opinion that Sean had not suffered from schizophrenia. She also pointed out that most patients with mild to moderate depression lead normal lives.

Employment History

[32] In her evidence in chief, the pursuer stated that Sean had worked in the family business in Scotland and the USA. She said that he returned to Scotland in 2002 in order to assist in relocating the business here. She understood that he lived off whatever he earned from the business. However, in cross-examination, she accepted that she was not aware that he had any other source of income and confirmed that she had given him financial support after his return to Scotland.

Mobility

[33] The only mention of a mobility problem is that contained in Dr Pearsall's letter of May 2005. Apart from a stomach ulcer, the pursuer was not aware that Sean had any other medical problems prior to the accident. There was nothing in the medical records to indicate any such problems. It was also pointed out in the pursuer's closing submissions that this issue had not been investigated as it had not been raised in the defender's pleadings.

Conclusion

[34] In my view, the inference to be drawn is that Sean had a higher degree of dependency than normal. I am not persuaded that he was unable to work, but looking at his employment record, there is at least a question-mark over whether he would have worked again. That impacts not only on his claim for loss of employability, but also on other heads of claim, such as extra expenditure. If he would in any event have spent most of his time at home, then he would not have incurred extra lighting and fuel costs.

Life Expectancy & Multiplier

[35] Professor Barnes, Professor of Neurological Rehabilitation at Newcastle University gave evidence about Sean's life expectancy. He is an acknowledged authority in the field and produces a paper entitled 'Life Expectancy for People with Disabilities'. The latest version is dated May 2007 [6/48]. In his report about Sean [6/47], he stated:

"In summary, it is reasonable to modestly reduce his life expectancy to recognize his unsteadiness and propensity to falling and his smoking habit and a very modest amount to reflect his significant cognitive and behavioural problems. In total, in my opinion, a reduction of about 24% is reasonable. The latest edition of the Ogden Tables indicates that a male aged 43. 5 years (to the nearest half year) has a further life expectancy of 40 years (to the nearest year). Thus, using these tables as a basis of calculation I suggest that Mr Milligan has a further life expectancy of about 30 years. This is a reduction of about 10 years from life expectancy and equates to death at around the age of 74. I should emphasise that this estimate is based on the continuing provision of good quality care throughout his life."

(para 15)

[36] In court, Professor Barnes stated that the new edition of the Ogden Tables (September 2008) increased life expectancy and a figure of 78 years might be appropriate for Sean. However, he accepted that there were limits to the value to be placed on the Tables and in particular that life expectancy was different (and lower) for many individuals in Glasgow and the West of Scotland. He stressed that predicting an individual's life expectancy was very difficult and stated "the more problems you've got, the worse the outcome". Lack of mobility lessened longevity, because the act of sitting down is itself life limiting. It led to an increased likelihood of pressure sores and osteo-porosis, together with an increased propensity to chest infection. Accordingly, it was important to keep Sean on his feet as much as possible.

[37] Mr Dunn's opinion was that "... it is unlikely that Mr Milligan's life expectancy has been substantially reduced by his injury": report [6/1] para 7.6. Mr Dunn said that after a severe brain injury, there could be some reduction of life expectancy. That was associated with post-traumatic epilepsy, and if there were significant problems with either mobility or feeding. In that sort of situation there might be a reduction of four or five years. As, however, those factors are not present in Sean's case, he estimated a reduction of life expectancy of about a year.

[38] Dr Langrell agreed that Sean did not have an increased risk of epilepsy. However, she estimated that his life expectancy was reduced by perhaps five or six years. Her estimate left out of account his smoking habits.

[39] On behalf of the pursuer, Mr Di Rollo submitted that it should be assumed that Sean would live until the age of 78 (ie for another 34 years). He contended that there should be no discount for the fact that Sean is a

smoker, as that is already taken into account in the tables. Mr Hanretty urged me to hold that Sean's life expectancy is 74.

[40] In my view, the figure of 74 years best reflects the weight of the expert evidence. Accordingly, using the Ogden Tables, the correct multiplier is 20.15.

HEADS OF CLAIM

Introduction

[41] The table at the end of this opinion summarises the awards I shall make under each head of claim. Certain items were agreed between the parties. They are marked with a tick. The disputed heads are discussed in more detail below.

[42] Before turning to the individual heads of claim, it is helpful to set out Sean's current position. A concise summary is provided by Professor Barnes [6/47]:

"Mr Milligan was seriously injured in a road traffic accident that occurred on 16 May 2004. As a result of this accident he has a number of significant problems including physical limitations with regard to his walking and independence. He has residual eyesight problems and reduced hearing. He is at slightly higher risk of epilepsy than the general population. He has a very significant range of cognitive problems which particularly include difficulties with recent memory, concentration, multi-tasking, slowed thought process and deficits of higher executive functioning, such as problems with planning, organising, insight and judgement. He also continues to have some significant behavioural disturbance. He needs a full 24-hour care regime and this will be required for life. He continues to need a review by a multi-disciplinary team skilled in the management of such individuals. He lacks capacity to understand the litigation process and manage his affairs. Regrettably, there is some compromise to his life expectancy to recognise his unsteadiness, his severe cognitive problems and his continued smoking habit."

(para. 16)

Solatium

[43] It was submitted that the appropriate figure for solatium was £200,000 (pursuer) and £150,000 (defender). Although reference was briefly made to various cases, none was said to be directly comparable to the circumstances of this case.

Brain Injury

[44] In my view, Sean's brain damage falls into the category of 'very severe' in terms of the Judicial Studies guidelines. The suggested range of awards in such cases lies between £180,000 and £275,000. I arrive at that view having regard to the uniform opinion of the medical experts. Mr Dunn, Dr Langrell and Dr McKinlay each classified this aspect of his injuries as extremely severe. Apart from the significant impairment in his cognitive functioning, he also has impaired sensation, coordination and power on his left side. It is almost certain that there will be no improvement in his condition.

Sight and Hearing Problems

[45] Sean has also sustained damage to his sight and hearing. He has impaired ability to move his left eye. Mr Dunn thought that the most likely explanation was that there had been a concussive injury to the cranial nerve. Because his eyes don't work in unison, Sean has diplopia (double vision). That contributes to his difficulties with balance, walking and co-ordination. To correct these problems he occasionally wears a patch over his left eye.

[46] Sean has impaired high tone hearing. He cannot distinguish speech from background noise. That makes it difficult for him to participate in conversation, listen to the radio, or watch television. Mr Dunn said that the explanation for Sean's noise intolerance was not clearly understood. Dr McKinlay suggested a link to the frontal lobes of the brain. When they were damaged, it can lead to a person over-reacting. He drew an analogy with the loss of function in the dampers of an old car.

Orthopaedic problems

[47] In the period after the accident, attention naturally focussed on Sean's head injury, as it was thought that Sean wouldn't survive. According to Mr McLean, consultant orthopaedic surgeon, that resulted in the level of orthopaedic intervention being less than would otherwise have been expected. In his view, the orthopaedic injuries were themselves severe and potentially life threatening. Although by January 2005, Sean was walking independently using a rolator and a hinge brace on his left knee, he has been left with a number of significant injuries. Having regard to those injuries and his severe balance and vision problems, Mr McLean thought it surprising that Sean can walk at all. In his view, Sean is likely to become wheelchair bound within a period of five to ten years, given the probable increase in arthritis and pain. Meantime, Sean should mobilise as much as possible.

Conclusion

[48] I take into account that Sean has a degree of social interaction and is capable of using a computer to download photos, send e-mails, and play chess. I also take into account his prior history of depression, his extensive period of unemployment and the chance that he might in any event have suffered from mental health problems.

[49] However, prior to the accident Sean was able to function in a relatively normal manner. He drove a car, played the guitar and walked his dog. While he did not participate in sport, he enjoyed the outdoors and photography. It is of some significance that the pursuer was prepared to let him look after her children when she was away abroad on business. There were only two documented episodes of depression. One occurred in the USA, the other in the UK. Neither appears to have involved a period of inpatient treatment.

[50] The accident has had devastating consequences for Sean. That is demonstrated by the fact that he requires round the clock care, seven days a week. Having regard to the nature of his injuries and the profound impact they have had on his life, in my view the appropriate award to make in respect of solatium is £200,000. I shall attribute one half of the award to the past. Accordingly, interest to the date of the proof amounts to £18,838.

Loss of Earning Capacity (Past and Future)

[51] As a result of the accident Sean will never work again. In the light of his employment history, it is not clear whether he would have done so anyway. No documentation or other evidence of any type was produced to vouch any earnings prior to the accident. Against that background, Mr Di Rollo accepted that I could not make an award in respect of future wage loss based upon a multiplier and multiplicand. He submitted, however, that I could make an award to reflect Sean's loss of earning capacity. Relying on the figures contained in Peter Davies' employment report [6/73], he submitted that the appropriate course was to take a broad view of matters and award £30,000 for the past (3 years at £10,000 per year) and £100,000 for the future.

[52] Mr Hanretty's primary position was that no loss had been proved. It followed that no award could be made. However, if an award was to be made, he suggested that a global figure for both past and future loss would be £30,000.

[53] In my view, Sean did have some prospects of working again. At the time of the accident he was an able-bodied man aged thirty nine with various skills. It appears that there would be a place in the family business

for him. The accident has deprived him of the opportunity of becoming employed again. To reflect all the various contingencies, I believe that the appropriate course is to make an award of £50,000 under this head. That covers both past and future loss and is inclusive of interest.

Services

[54] Sean's accident has had a major impact on the pursuer's private and professional life. As the only close family member residing in Scotland, a significant burden has fallen upon her. It has involved her in visiting him in hospital and caring for him in her own home when he was first discharged. At that time she was still receiving chemotherapy. Her relationship with her partner of eight years broke down, a fact that she attributes to the problems with Sean. It also led to difficulties with her children. They returned home less when Sean stayed with her to avoid having to deal with him. Her commitment to his care has also materially affected her work. She is a property consultant who provides advice and support to people who wish to invest in the property market, both here and abroad. Her role covers purchasing, furnishing, letting and selling property. Throughout the period since the accident, the pursuer has taken the main responsibility for taking decisions about Sean's care.

The Objection to Mrs Mattar's Evidence

[55] The pursuer led the evidence of Mrs Ann Mattar in support of the claims for services, care and a number of financial heads of claim. The detailed figures upon which Mr Di Rollo relied are contained in her report [6/58]. Mrs Mattar is an employee of CMS and her curriculum vitae was lodged in process [6/50].

[56] Mr Hanretty objected to Mrs Mattar's evidence in the course of the proof. He contended that no weight could attach to her evidence, In seeking to have it excluded, he relied on the decision of Lord Brodie in *Donnelly v FAS Products Limited* 2004 SCLR 678, which had been followed by Lady Smith in *Fallon v Lamont* (unreported) 13 July 2004. In *Donnelly*, Lord Brodie declined to accept the views of a witness who had prepared a services report. He held that a claim for services was not properly the subject of opinion evidence. Rather, it was a matter of fact for the court to determine what was reasonable remuneration. That decision should be made in the light of evidence as to the cost of obtaining equivalent services on a commercial basis: paragraph [60]. The evidence in question usurped the function of the court: "... what [she] has done is to act as a fact finder and the assessor of the facts she considered that she had found in order to state the number of hours that she considers might be attributed to 'necessary services'": paragraph [61].

[57] Mr Di Rollo submitted that that the method of eliciting evidence from Mrs Mattar was perfectly legitimate. He emphasised that there had been no departure between what the pursuer had said in court and what the report of Mrs Mattar records her as having said. Accordingly he invited me to rely upon the information and calculations contained within the report.

[58] In my view, there is force in the defender's objection. It is a question in each case for the court to determine the facts and to award a sum based its own assessment of the evidence. That was the approach taken by Lord Brodie in deciding that it was proper to make a services award in *Donnelly.*

[59] In this case I am not persuaded that the whole evidence of Mrs Mattar falls to be excluded. Where there is a foundation for her figures and the methodology behind her approach is patent and convincing, I have found it of assistance in arriving at my determination on individual heads of claim. I also took into account the fact that senior counsel for the defender was in a position to subject her evidence to a searching cross examination. If such evidence could not be relied upon, it would place a very onerous burden on pursuers seeking to establish damages in complex cases. In this case, as is common, the defender also led the evidence of a person- Mrs Gough-experienced in the field of care and services who had prepared a report on Sean's requirements [7/6].

[60] In respect of services, evidence was led about comparable rates of remuneration. Mrs Mattar's report provides details of the 'Crossroads' rates. Mrs Gough based her calculations on the rates for home carers

issued by the National Joint Council for Local Government Service. Accordingly, there was a factual basis for the exercise to be undertaken.

Past Services

[61] In respect of past services, the pursuer sought an award of £74,310. That was based upon the following calculations, using a twenty five per cent reduction in some instances to take the incidence of tax and national insurance out of the calculation:

a) Wishaw General Hospital

(18.5.04 - 27.7.04 = 70 days)

12 hours each day (incl. 1 hr for travel) = 840 hrs @ £5.66 per hr = £4,754 Car journey of 34 miles return @ 18.90p per mile x 70 days = £450

b) Central Scotland Brain Injury Rehabilitation

(27.7.04 - 10.2.05 = 198 days)

31/2 hrs each day = 693 hrs @ £5.66 per hr = £3,922

Car journey of 40 miles return @ 18.90 per mile x 198 days = £1,497

c) Care in the Pursuer's House

(10.2.05 to 15.8.06 = 551 days)

£54,815 x 75% = £41,112

Housekeeper = £1,950

d) Royal Edinburgh Hospital, Robert Ferguson Unit

(9.8.06 - 11.12.07 = 479 days)

3 hours each week + 71/2 hrs travel = 101/2 hrs x 68 weeks = 714 hours

714 hours @ £6 per hr = £4,284

Car journey of 105 miles @20p per mile = £21 x 204 = £4,284

e) *Care 1.12.07 to 18.2.08*

£13,631 x 75% = £10,223

f) *Care 18.2.08 to 31.1.09*

f)£2,445 x 75% = £1,834

[62] By contrast, Mrs Gough valued the pursuer's claim at £20,363.86. Her calculation was: (a) three hours a day from 27 July 2004 to 10 February 2005 at £6.07 per hour; and (b) 30 hours per week from 11 February 2005 to the end of October 2006 at between £6.07 and £6.41 per hour.

[63] It was not disputed that the pursuer did provide services, nor that her input markedly decreased after the care regime was put in place. There was, however, no precise evidence about the exact amount of time spent by her. I was simply presented with the respective estimates given by the authors of the two care reports. In my view, Mrs Mattar's approach is flawed, because it assumes that all contact between the pursuer and Sean amounted to necessary services. Equally, Mrs Gough has left out of account any services provided by the pursuer in the period after October 2006. On the imperfect material available to me, I have decided that the correct approach is to make a lump sum award for past care of £40,000, inclusive of interest.

Future Services

[64] In respect of future services, the pursuer submitted that the calculation should be based upon her providing five hours per week for the whole period of the multiplier. Mr Di Rollo said that the proposed rate of £8.43 per hour had again been discounted to reflect the fact that tax and National Insurance will not be paid. Mr Hanretty pointed out that the pursuer is now more involved as a sister, rather than someone providing services. He also contended that after March 2006, there might be a degree of double counting to the extent that she receives compensation in her capacity as Sean's guardian.

[65] In my opinion, while the pursuer remains in overall charge of Sean's care, the involvement of both a case manager and a care team has greatly eased her responsibilities. She now visits two or three times per week for periods between forty and ninety minutes. She also speaks to him on the telephone at least once a day. I accept that Sean still only wants her to do certain things, such as buying his clothes. The pursuer struck me as a loving and loyal sister. Given Sean's history of dependence, it is likely that she might have been involved with him to a similar extent, event if the accident had not occurred. I also take into account the fact that she pursuer is now aged in her fifties and has had significant health problems in the past.

[66] Taking all these factors into consideration, in my view the sum which properly reflects the services she will provide in the future is £20,000.

Case Management

Case Manager's Role

[67] CMS specialises in the community based rehabilitation and support of patients with brain injury. Mrs Hodge explained that it currently has responsibility for thirteen patients. Her own active caseload is six patients. After she first met Sean when he was in the Robert Ferguson Unit, she decided that agency care was the most appropriate regime for his requirements. She looked at a number of agencies and chose Momentum for two reasons. First, because she had successfully worked with them in the past. Secondly, Momentum is an offshoot of a larger organisation and appeared to be on a sound financial basis.

Past

[68] It was agreed that the costs of case management to date were £13,960. Interest of £558 falls to be added to that sum.

Future

[69] In my view, the need for future case management was clearly made out in the evidence. I was impressed by Mrs Hodge, who struck me as a careful and candid witness. Her evidence was supported by Professor Barnes, who thought that case management was the pivot around which Sean's care arrangements turned. In his view it was clearly required for life. He said that it was important that people with complex problems should be reviewed every six months by small teams of relevant professionals. Mrs Cossar gave evidence to similar effect. She is an occupational therapist and the clinical director of Phoenix Care, an organization that operates in the same field as Momentum. I concluded that it was preferable to have one person who supervised Sean's care and liaised with the various professionals.

[70] The pursuer sought a sum based upon Mrs Hodge providing nine hours per month, plus travel costs and VAT. Mrs Gough did not dispute that a case manager was required, but thought that her involvement might be slightly less, perhaps six to nine hours per month. On the basis of Mrs Hodge's evidence about her role and the time she allocated to Sean, I believe that this branch of the claim is well founded. I shall therefore award the sum of £234,111 sought by the pursuer.

Past Care

[71] It was agreed that the costs of employing Momentum to the date of the proof amounted to £91,394, with interest of £3,656.

Future Care

[72] There is no dispute that a twenty four hour, seven day a week care regime is required until Sean dies. There were, however, three issues in relation to future care, which I shall deal with in turn.

(a) Direct or Agency Care?

[73] The current arrangements with Momentum under the supervision of a case manager seem to working very well. There was no suggestion to the contrary from any of the witnesses. But relying on Mrs Gough's evidence, Mr Hanretty submitted that the same standard of care could be provided at a cheaper cost by means of directly employed staff. It is necessary to test each of these contentions.

[74] The pursuer was reluctant to proceed with a team of non-agency carers. She regarded such an arrangement as effectively requiring her to run a small company. If she became the employer herself, it would make substantial inroads into the time she wished to devote to her children and to her business. She also had concerns about Sean's care arrangements, standing her own continuing health problems. She was understandably anxious about Sean's care should anything happen to her. If Mrs Hodge was to become the effective employer, the pursuer thought that she would have to be taken on full time and that might remove any cost advantage presented by non-agency care.

[75] Mrs Hodge said that she would always recommend the use of agency staff in a case such as Sean's. Her opinion was based upon fifteen years' experience of both types of care and rested on a number of factors. She said that the work of the carers can be intensive and they often prefer the backing of an agency. When persons are employed directly, there is often a high turnover of staff. Mrs Hodge also mentioned the duties incumbent upon employers in this field. They require to advertise, recruit and train staff. The training must cover brain injury care, manual handling and general health and safety. In this case, Momentum had provided the basic training. That had been supplemented by Mrs Hodge herself and by staff from the Robert Ferguson Unit, which she had arranged.

[76] I found the evidence of Mrs Hodge persuasive on this point. It was supported by the evidence of Mrs Cossar, whom I also found to be a cogent witness. Mrs Cossar thought that a high level of skill was required in Sean's case, because of his diverse needs: "Sean has needs at the high end of the spectrum-physical, cognitive, sensory". She listed the advantages of agency care as being:

m) Agencies must be regulated by the Care Commission.

n) They tend to have a large pool of people to draw on.

o) They can carry out the necessary disclosure checks and confirm that the persons employed as carers have the right experience and expertise.

p) They have experience and expertise with training.

q) The involvement of an agency reduces the case manager's workload.

Mrs Cossar thought that there needed to be a range of staff, both in Sean's best interests and those of the carers, as the work can be emotionally draining for them.

[77] Professor Barnes also had expertise in this area, having helped to develop specialist centres in rehabilitation medicine some 20 years ago. Because of his memory problems, Sean has difficulties in recognising people. Accordingly, said Professor Barnes, it is very important to have a team that changes as little as possible. A familiar team of carers helps to ensure the quality and consistency of treatment. They are more likely to detect subtle changes in Sean's behaviour. He is likely to be calmer and to respond better to persons he knows.

[78] In light of that evidence, I conclude that the best arrangement for Sean is agency care. I am not persuaded that an equivalent standard of care would be attained with direct employment. There are a number of logistical problems in providing round the clock cover. At the moment, there is a team of five carers, plus one person to provide relief cover. Mrs Hodge thought that was a realistic complement. If a member of staff resigns or goes on sick leave, an agency is more likely to obtain a suitable replacement at short notice.

[79] I am fortified in my view when I consider the question of cost. There was a suggestion by Mrs Gough that the cheapest care solution would be to have one or two residential carers. That was not pressed by Mr Hanretty in his closing submissions, perhaps because no other witness supported that view. Mrs Cossar stated that such care would not be appropriate and Dr McKinlay, who was not given to hyperbole, described the suggestion as "preposterous".

[80] Dr McKinlay also stated that in his considered view, the costs of employing an agency such as Momentum were comparable with attempting to provide care by means of direct employment. I found that evidence of some value, because CMS had first hand experience of both methods of care. It was also difficult to make a comparison between Momentum's rates and those set out by Mrs Gough, because she based her calculations upon the hourly rates for carers paid by South Lanarkshire Council. Her calculation did not fully take into account the other charges relative to administration, training, and disclosure which would be incurred.

[81] While I accept Mrs Gough's statement that providing care through an agency is always an expensive method, it does seem reasonable in this case, particularly as Momentum is not the most expensive agency in the market. Its rates are below those of Phoenix. I do not think it reasonable or practical to require the pursuer to arrange care on the basis of the direct employment model. It was agreed by parties that if Momentum continued to provide future care for Sean, the annual cost of care would be £95,368 per annum.

(b) Extra Care

[82] The pursuer made a claim for additional care in the future. It was contended that two carers will be required (a) to allow him to participate in five hours social activities per week; and (b) to assist as his mobility problems increase. In respect of (a), I am not persuaded on the strength of the evidence of Mrs Mattar alone. There was no other testimony which supports this branch of the claim.

[83] In respect of mobility, the defender suggested that the provision of a hoist would allow any weight-bearing transfers of Sean to be carried out. That evidence came from Mrs Gough. However, I preferred the evidence of Professor Barnes, who thought that two carers would still be required, even if a lift was used. There was a risk that the patient might be dropped. Further, Sean might have pressure sores and it would be unsafe for one carer alone to drag such a patient to a hoist. He also thought it would be contrary to the Manual Handling Regulations.

[84] As Sean's condition declines with age, his care requirements will increase. I accepted the evidence that after four years, he will require two hours of additional care and that after nine years he will require four

hours of additional care. In each case that would amount to an extra £9,345 per annum.

[85] Accordingly, the calculation for future care is as follows:

3.62 x £95,368 = 345232.16

4.05 x £104,713 = £424,087.65

12.48 x £114,058 = £1,423,443.84

Total £2,192,763.65

Uplift of 10 Per Cent

[86] Mr Di Rollo submitted that a premium of ten per cent should be built into the equation. He founded that proposition on a statement in Mrs Mattar's report that if the arrangement with Momentum broke down, the pursuer may have to pay a higher commercial rate to attract and keep good care staff. Mrs Cossar agreed that a premium might be required.

[87] In my view, it was not established that a premium was required. Mrs Mattar did not provide any data or details and conceded that it was not within her area of expertise. That was not a sure basis for making such an uplift. Given the shifts in the economy, it is a matter of conjecture and I decline to make an award under this head.

Additional Expenditure

Past

[88] Under this head of claim, the pursuer sought £1,718 in relation to increased costs for heating, lighting, clothing and bedding. It was argued that Miss Mattar had given unchallenged evidence that as a general proposition, there are always increased costs for disabled persons.

[89] In my view, there is insufficient evidence to justify an award for past costs. I would expect to see clear vouching of such expenditure. For example, if a claimant suffered from incontinence problems, receipts for extra laundry costs would be lodged. There was nothing similar here. Sean's expenditure could have been the same if the accident had not occurred. He might well have remained out of work and stayed at home.

Future

[90] In my view, different considerations apply to the pursuer's claim for £58,322 in respect of future additional expenditure. As his condition deteriorates, it is likely that Sean will increasingly remain at home and be more confined to bed. That will have an effect on these costs. In my view, it is appropriate to make an award of £20,000 under this head.

Past Equipment

[91] Three sums were sought under this head. The sum of £6,386.17 in respect of a wet shower was agreed. Liability for the other two sums was disputed. They were (a) £4,912 for furniture in the flat; and (b) £2,993 for items purchased. Mr Hanretty submitted that there was no proper evidence in this regard. In particular there was no evidence about what would be different in respect of future costs. Again, I am not satisfied that the purchase of this equipment was specifically attributable to the accident. Accordingly, I shall make no award under this head.

Future Equipment

[92] As well as her care and services report, Mrs Mattar also produced an equipment report [6/26]. It detailed a great many items of equipment, including adaptations for his accommodation, which would assist Sean in coping with his disabilities. No challenge was made to that evidence, nor were any alternative figures suggested by Mrs Gough. Accordingly, I shall award the sum of £32,121 sought by the pursuer under this head, which seems to me to accurately reflect what will be required. That was based upon the two Appendices to the report (£800 x 20.15 years + £968 x (20.15 -3.62).

Accommodation

[93] As mentioned above, Sean's current flat is not entirely suitable for his needs. It is not easy to manoeuvre a wheelchair within the flat. His ability to manage the step leading into the block may become more difficult as his condition deteriorates. Being on the ground floor, he is irritated by people who buzz to gain entry to the common stair. The pursuer wishes to build a new bungalow on an open site. She has identified two potential plots, which her solicitors have indicated would each cost about £125,000 to purchase. She perceived the benefits of such accommodation as follows: (a) Sean would have the benefit of a garden; (b) he would be able to keep a pet; (c) a third bedroom would allow one of his sisters to stay with him, which he would very much like; and (d) it would give him more space for a wheelchair. Professor Barnes said it would be preferable if Sean has his own garden, as one of his few interests is looking at wildlife.

[94] The question of converting an existing property was canvassed in the evidence. Mr Reginald Auld, architect accepted that it would be a cheaper option, but thought that finding a suitable bungalow in the right area would be "as rare as hen's teeth". The pursuer had discounted that option, as there were few bungalows built in the last twenty years.

[95] Mr Auld, gave unchallenged evidence that building costs would be about £220,000 and design fees £17,600. He also thought that a figure of £120,000 for the cost of purchasing the land was reasonable. The defender did not challenge the building costs, but did query the cost of the building plot on the basis that the quality of the evidence was too low. I am satisfied, however, that it is appropriate to £190,598, based upon the following calculation:

(a) land and building costs £171,275 (£340,000 x 2.5% x 20.15)

(b) architects' fees £17,600

(c) legal fees £1,723

Sister's Travelling Expenses

[96] It was agreed that the cost of Sean's sister's travel from the USA at Christmas 2007 amounted to £1,891, together with interest of £151.

Transport

[97] The pursuer sought the sum of £5,000 per year for the provision of a car. I accept that problems of access, noise, mobility and balance mean that he cannot travel by means of public transport. However, the extent to which he would use a car is far from certain. At present, only one of his carers has a driving licence. There is no parking space at the front door of his flat. Further, taxis with proper wheelchair access are suitable for Sean, as long as the driver is instructed to shut the door quietly. It is also proper to take into account Sean's frequent bouts of inertia and the increasing mobility problems he will suffer in the future. All these factors persuade me that it is not appropriate to make the award sought by the pursuer. Taking into account the evidence before me, I shall award a lump sum of £21,000.

Holidays

[98] On behalf of the pursuer, the sum of £10,832.72 per annum was sought under this head for the full period of the multiplier. That was based five weeks' holiday each year with on two carers accompanying Sean, providing sleepover care at night. The breakdown of the annual figures was as follows: (a) the cost of care £7,707.32; (b) the cost of carers' travel £1,674; and (c) the cost of carers' subsistence £1,450.40. The total claimed was therefore £218,245.

[99] Mr Hanretty said that I should take a broad brush to this head of claim. He submitted that it should be restricted to the cost of flights, and that the cost of paying for two carers should be excluded. Since the accident, Sean had traveled three times to America to visit his family. On each occasion the pursuer had accompanied him on the way out and one of his other sisters had assisted him on the return journey.

[100] There was no clear evidence about a number of relevant matters. It was not plain how keen Sean was to go on holiday, whether he would be prepared to visit anyone apart from his sisters in America, whether two carers were actually required, or why the care costs were not subsumed within the existing budget. Further, the claim does not take into account the fact that as Sean's mobility declines, he will be both less inclined and less able to travel.

[101] In the circumstances, it is my view that the appropriate course would be to take a broad view of matters. I am of opinion that Sean can reasonably be expected to go on holiday once a year for the next fifteen years. Making a calculation broadly based on the travel and subsistence costs of one carer accompanying him with some tolerance built into the figure, I shall award £60,000 under this head.

Medical review

[102] The evidence of Professor Barnes that an annual medical review was required was not disputed by the defender. Accordingly, I shall award £40,300 under this head, based on an annual recurring cost of £2,000.

Treatment & Therapies

[103] The defender agreed that the total figure for treatment was £9,882. With regard to dental work, Mr Hanretty accepted liability to repair Sean's teeth at a cost of £1,500. He also accepted that Sean's rehabilitation will be assisted by physiotherapy, occupational therapy and clinical psychology. That was strongly supported by the expert witnesses, in particular by Mr Dunn and Professor Barnes.

[104] The defender, however, pointed out that such treatment may be available on the National Health Service. Mrs Mattar's report used the phrase: "If this were to be required on a private basis" as a preface to her suggested figures, which were as follows:

Occupational Therapy	£1,892 per annum in year 1 only
Physiotherapy	£635 per annum in year 1 only
Speech and language therapy	£185 per annum in year 1 only
Psychology (30 sessions)	£3,300 + VAT throughout
Dietetic input	£230 per annum in year 1 only

[105] I was satisfied that this head of claim should not be excluded by reason of possible NHS treatment. However, it seemed to me that some modest discount made to reflect that fact. Accordingly, I shall award £7,500 under this head.

Guardianship

Past

[106] The past costs of guardianship were agreed at the figure of £10,436.11.

Future

[107] The pursuer claims £132,000 in respect of the future costs of guardianship. That is based on accountancy costs of £6,000 per year for twenty two years (ie including the final year of the multiplier). Mr Hanretty took issue with the claim on the basis that there was no evidence as to what fees the accountant would charge. He suggested that a figure of £50,000 should be allocated under this head. There is force in that argument. There is no material to justify the pursuer's suggested figure. I shall therefore award £50,000 in this regard.

Conclusion

[108] It was agreed by parties that I should put the case out By Order, in order that I could be addressed on any final matters of arithmetic arising out of this opinion.

Summary

Head of Claim	**Agreed**	**Award (£)**
Solatium		218,838
Loss of Earning Capacity		50,000
Services		
Past		40,000
Future		15,000
Case Management		
Past	√	14,519
Future		234,111
Care		
Past	√	95,050
Future		2,192,763.65
Additional Expenditure		
Past		0
Future		20,000
Equipment		
Past		0
Future		38,896
Accommodation		190,598
Sister's Travelling Expenses	√	2,042
Transport		21,000
Holidays		60,000
Medical Review	√	40,300
Treatment and Therapies		7,500
Guardianship Costs		
Past	√	10,436.11
Future		50,000
Total		3,301,053.76

* All awards in respect of the past include interest